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No. 692

In the Supreme Court of the United States

October Term, 1944.

JAMES T. SPENCER, ADMINISTRATOR OF THE ESTATE OF JACKSON BARNETT,
Petitioner,

vs.

GYPSY OIL COMPANY, A CORPORATION; GULF OIL COMPANY, A CORPORATION; F. A. GILLESPIE, *ET AL., Respondents.*

Reply of Petitioner to Brief of Respondents

CHARLES B. ROGERS,
Counsel for Petitioner.

Of Counsel:
JOSEPHUS C. TRIMBLE,
HARRY S. HALL.

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REPLY OF PETITIONER TO BRIEF OF RESPONDENTS.

In taking up the response to the petition herein, we find respondents referring to the withdrawal of the intervening petition of the United States, and ascribing as a ground for its withdrawal, the following, on page 1 of their brief:

> "The United States which, for a time, was a party to this action, obviously concluded that there was no merit in petitioner's claims, and that the same were untenable. On February 20, 1939, about three months after the commencement of the action, the United States intervened therein, and took a position on behalf of petitioner, or in accord with his claims. [2] Thereafter, pursuant to a pre-trial conference, the United States filed a brief in support of the admissibility, upon the trial of the case, of evidence as to the alleged mental

incompetency of Jackson Barnett on March 5th, 1912—the date of the execution of the oil and gas lease involved herein. Thereafter, the District Court advised the parties that, upon the trial of the case, it would hold such evidence inadmissible. Thereafter, on June 26, 1942, the United States moved for, and was granted leave to, withdraw its complaint in intervention, and thereby abandoned petitioner. (R. 614-616) Subsequently, the District Court, and later the Circuit Court of Appeals, held petitioner's claims were without merit and untenable. Apparently, petitioner's strategy is that constant and repeated reiteration of his claim might, somehow, somewhere, or at some time, eventuate in their adoption."

Again, on page 6, reference is made to the attitude and position of the United States, in its intervention and withdrawal, and the following language is used:

> "As we have heretofore seen that the United States, evidently realizing there existed no ground or grounds justifying the vacation of said judgments or decrees, withdrew from the case. (R. 614-616)"

The foregoing recitals have no place in this response, in determining the right of petitioner to a writ of *certiorari* and a review in this Court of the judgment of the Circuit Court of Appeals in this cause, and this Court should disregard the ungrounded assumption that its withdrawal referred to was due to "a conclusion that there was no merit in petitioner's claims, and that the same were untenable."

In this connection, counsel for petitioner asserts that no such conclusion was claimed or asserted by the United States, as a ground for its withdrawal. Indeed, no ground was asserted or claimed as its reason for withdrawal. Its withdrawal is marked by the unusual fact and circumstance that, after four years of collaboration with petitioner in his

suit and in the prosecution of its intervention, by briefs and oral arguments, its withdrawal was made upon a telegraphic request to the United States Attorney—without assigning any ground or reason—to withdraw said intervening petition, and without notice or consultation with counsel for petitioner, or the United States District Attorney in charge of said cause, said withdrawal being two days before said cause was set upon the trial docket for hearing.

Whatever may have been the reason for its withdrawal does not in any way change or affect the right of petitioner herein to a writ of *certiorari*, and a review of the judgment of the Circuit Court of Appeals.

The record facts, and the judgment of the Circuit Court of Appeals, determines in this Court the fate of petitioner in his struggle to have this cause reviewed, and not what the United States did, or whatever reason it had for doing it.

There is nothing in this record touching the withdrawal of the United States from this case which discloses any reason for its action. But the record does suggest a sounder basis for an inference than that advanced by respondents.

The United States intervened in the original litigation, ostensibly as the guardian of Jackson Barnett, but, in fact, as an adversary, aiding the oil companies who were resisting his claims. And it did not intervene therein wholly on its own motion. It came in at the insistence of counsel for one of the oil companies. Petitioner here calls attention to a part of the correspondence. (R. 726-727) Mr. Andrew Mellon who arranged for the interview of Judge Diggs with the Attorney General, was then a co-member of the President's cabinet and a member of the board of directors of the Gulf Oil Corporation (R. 163), all but a few shares of the Gypsy Oil Company were owned by the Gulf Oil

Corporation. The record also contains the letter of Judge Diggs to the Secretary of the Interior, urging that he request the Attorney General to enter that litigation (R. 715-722),

> "* * * for the purpose of assisting in upholding and sustaining said oil and gas lease, and the action of the Department in regard thereto,"

which amounts to a direct request that the United States, in the guise of its assumed guardianship, oppose the claims of its ward. This, the United States consented to do, and did do.

In all the history of litigation involving the Indian and his rights, there is not to be found another case where the Government, acting as guardian, thus actively opposed the rights of the Indian.

The sudden and unexplained withdrawal of the United States from this proceeding may well have been influenced by its previous action. Such inference is more reasonable than the one advanced by respondents.

The petitioner herein asserts that, upon the record facts disclosed in his petition, the judgment of the Circuit Court of Appeals determining against the rights of this old Indian to property worth millions of dollars was in *conflict* with, and violates the decisions of this Court and of the Circuit Court of Appeals of the Tenth Circuit, and like decisions of the Circuit Court of Appeals of the Eighth Circuit; and decisions of the Fifth Circuit Court of Appeals; and the decisions of the highest court of Oklahoma, in a score of cases determinative of the law fixing the ownership and rights of property of this Indian.

If this Court is to consider, as an element in this matter, the participation in this suit of the United States, and its subsequent withdrawal, then it should not do so except

upon a review by this Court of the judgment of the Circuit Court of Appeals, after granting a writ of *certiorari*, and upon a full hearing of the case.

Another question urged by respondents in their brief, to which we wish to call attention, is set out on page 5, where respondents use the following language:

> "In so far as this action is concerned, petitioner is, in a sense, a mere interloper, because he is merely prosecuting this action as administrator of the estate of Jackson Barnett, the full-blood Creek Indian involved herein, and because the subject-matter of this action, being restricted Indian property, is not property subject to administration by any probate court of Oklahoma. Petitioner has no duty, with respect to such property, and his interest is not hard to see. Such interest is not wholly charitable. The proper parties to maintain this action are the United States, or the heirs of Jackson Barnett."

Again, respondents seek to drag into the issue here, a matter which was not decided by the Circuit Court of Appeals, and upon which decision it rested its judgment.

The question of the capacity to sue in this action was not determined in the Circuit Court of Appeals, *as the basis of its affirmance of the lower court*. That court, by its decision, by implication, and necessary deduction, refused to affirm the lower court, upon that ground.

In the shaping of the issues to be raised upon the petition for *certiorari*, it is apparent that the only question brought before this Court for consideration by the petition was, whether or not the decree was, as contended by the petitioner, a "consent decree," or as concluded by the Circuit Court of Appeals, in its decision, an adjudication upon the merits of the consolidated action. It is so clearly ap-

parent that this Court, before it may pass upon the question of capacity to sue, should bring the entire record before it for review, and to that end, this Court should consider the statements of counsel, as a request that the writ issue herein.

This action is in the nature of an *ancillary suit*, to vacate and remove the consent judgment which stands in the way of a trial of Consolidated Action No. 216-Equity, upon the merits thereof, which the consent judgment prevented being done.

It is the statutory duty of the administrator to marshal all assets of estate and preserve same for the benefit of the heirs. (See Secs. 1193 to 1196 of Oklahoma Statutes 1931.)

At the time this action was begun (Nov. 2, 1938), the question as to who are the legal heirs of Jackson Barnett, had not been determined, and was not until March, 1942, when this Court refused *certiorari* in the heirship case. The respondents had assailed, in April, 1939, the right of both the United States and petitioner to maintain the suit and, at that time, respondents were also pleading the Oklahoma Statutes of Limitations against both the intervening petition of the United States and of petitioner herein. (R. 302-303 to 319-421-438)

The United States District Court, at Tulsa, at that time had held that it was the duty of an administrator of the estates of deceased, restricted Indians, to bring actions for oil wrongfully removed from the Indian's restricted lands. *Simon* v. *Schaffer*, 11 Fed. Supp. 450. And the Circuit Court of Appeals of the Tenth Circuit had followed decisions of the Oklahoma Supreme Court and, upon its own rule, sustaining the capacity of the administrator to

sue in cases similar in principle to this one, and involving restricted Indian property.

In re Thompson's Estate, 179 Okl. 240, 65 P. (2d) 442;
Hardridge v. *Hardridge*, 168 Okl. 7, 31 P. (2d) 589;
United States v. *Bond*, 108 F. (2d) 594;
State, ex rel. Murray, v. *Pure Oil Co.*, 189 Okl. 507, 37 P. (2d) 608;
Caesar v. *Burgess*, 103 F. (2d) 503;
Forrester v. *So. Pac. Co.*, 134 Pac. 753;
Kendall, Adm'r, v. *Ewert*, 66 L. ed. 862-867.

It is not a pleasant duty for counsel for petitioner to feel compelled to characterize the reference to petitioner as "an interloper," and to attempt to impugn the good faith and purpose of this action as unethical and without foundation.

That implication is intended, no doubt, to prejudice the minds of this Court against petitioner and his cause, and likewise, against the County Court which appointed him as administrator of said estate, and which directed him to enter and prosecute this action to a final judgment in the interest of, and for the benefit of, the legal heirs of this unfortunate old Indian.

Such statement as respondents have taken the liberty to insert has no place in this proceeding, and should be stricken from such response. It reflects no credit to respondents' efforts herein, they, who have stripped this old Indian and his heirs of seven-eights of all his great wealth by the very acts complained of in petitioner's suit herein.

It is a remarkable fact that respondents, nowhere in their brief, attempt to point out any error in petitioner's claim that there is a clear and unquestionable conflict between the "consent decree" here involved, and the de-

cisions of this Court, of the Circuit Court of Appeals for the Eight and Tenth Circuits, and, in principle, of the Fifth Circuit, and the highest court of the State of Oklahoma, in the many cases cited and referred to in the petition, which go to the very heart of the question here. And it is apparent, counsel cannot point to a single case where such conflict does not exist, notwithstanding they have, in general terms, asserted there is no conflict. (See petition—Reason for Granting Writ, pp. 15-16-17-18-19-20, and foot-notes.)

On page 2 of their brief respondents say:

> "Petitioner seems unable to resist making inaccurate statements of fact, or qualifying same to fit the law, and *vice versa*, but in spite of indulgence in this field, he winds up with misfits."

This is followed by five examples of what they assume to refer to in the above remark:

Their first example is that petitioner has repeatedly asserted that it is admitted by respondents that, on March 5, 1912, the date of the execution of his oil and gas lease, Jackson Barnett was mentally incompetent.

We assert that, nowhere has petitioner made any such statement, but petitioner did state, and now repeats the assertion, that the Circuit Court of Appeals, in its opinion, concedes the mental incompetency of Jackson Barnett on the date he signed the oil and gas lease, and that he was then incompetent to execute it. (See petition, p. 23, foot-note 11.)

This admission by the Circuit Court of Appeals was based upon several decisions of the courts, including the decisions in the cases of

Mott v. *United States*, 283 U. S. 747, 75 L. ed. 1385;

United States v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379 (decided by this Court);
United States v. *Mott*, (C. C. A., 10th Cir.) 37 F. (2d) 860;
United States v. *Anna Laura Barnett, et al.*, 82 F. (2d) 765;
Barnett, Incomp., v. *Equitable Trust Co.*, 21 F. (2d) 325;

and other cases.

So firmly was this concession made by the Circuit Court of Appeals that it also conceded in its opinion, that the judgment entered by the trial court, in Consolidated Equity No. 216, was an erroneous judgment (foot-note 11).

On page 3, paragraph 2, of respondents' brief, respondents charge: That petitioner has repeatedly asserted that respondents have admitted that "The aforesaid decrees were void and invalid."

No such statement can be found in the petition.

However, petitioner does state that this concession was made by the Circuit Court of Appeals (see foot-note 11, p. 23 of petition).

The third example cited on page 3 of respondents' brief, charges that: "Petitioner repeatedly asserts that it is admitted (by respondents) that the oil and gas lease was void and invalid." Counsel do not point out any such statement in the petition.

But petitioner now asserts that, the Circuit Court of Appeals admitted, as a matter of law, based upon the incompetency of Jackson Barnett, to execute the lease, that the same was "void." (See same foot-note.)

The fourth example cited on the same page of respondents' brief is the charge that, petitioner has repeatedly as-

serted "that it is admitted that the afoersaid judgments or decrees were and are merely and solely 'consent decrees or judgments' entered merely and solely, *pro forma*, upon the compromise agreement involved herein, and without any judicial inquiry and determination on the part of the District Court which made and entered the same."

Whatever may be said as to its meaning and effect, petitioner has charged and asserted, and now re-affirms the statement that respondents, as one of their defenses to petitioner's action, has pleaded that said decree was a "consent decree"—entered upon a compromise agreement by the representatives of Barnett and the oil companies, and because it was a consent decree, the same could not be assailed in the manner and form the same was assailed in petitioner's suit.

This defense was repeatedly pleaded and asserted by respondents and by this pleading, respondents conclusively characterized the decree as being one entered *pro forma* upon a compromise agreement. (See petition and brief, p. 24, foot-note 12.) Quoting from the answer of respondents. (See also, R. 444, par. 9, answer; p. 502, par. 12, ans.)

These admissions and contentions by respondents were made at a time when there was no reason for asserting the contrary, as they are now doing. They knew then, that there was nothing but a *pro forma* approval by the Court upon the compromise agreement and that there was no trial or hearing, nor consideration of any evidence of any kind or character, in support of any issue involved in the litigation compromised.

On page 4, in example 5, referred to in the brief of respondents, petitioner concedes that he has repeatedly asserted, that the Circuit Court of Appeals, "in its opinion

conceded, that Jackson Barnett was mentally incompetent on March 5, 1912; and that the oil and gas lease involved herein was and is void," and that such assertions constituted only partial truth.

Petitioner denies that such assertions constituted only partial truth.

Respondents' statement which then follows, "that the only concessions made by the Circuit Court of Appeals were 'for the purpose of this opinion.' (Rec., p. 827.)"—dose not alter the effect of said concessions, nor the truth of the matters conceded.

It is characteristic of respondents to seek to avoid the force and effect of said concessions because of the consequent disaster to their defense which follows upon those conceded facts. And it was for this very reason that they did not permit said action to go to trial upon the merits.

The concession of Barnett's mental incompetency, at the time he executed the lease, as we have before asserted, was established as a judicial fact, in a dozen courts, and in the Circuit Court of Appeals in which the opinion in this case was written. And, to say that the concession was "for the purpose of its opinion," could have no consideration as a challenge to the correctness of the concession.

The foregoing "five examples of erroneous statements" made by petitioner, as charged in respondents' brief, constitute all of such statements pointed out.

Yet, on page 5 of said brief, respondents again violate the rule that, where erroneous statements are charged each must be clearly pointed out, else such charge will be disregarded.

Counsel's argument (brief, pp. 3-4) that the compromise

agreement was but the initiation of the decrees later entered, and was not the sole basis of such decrees, *is fallacious.*

It is not contended, and indeed could not be, that the compromise agreement was not complete in itself; that as approved by the court, it embodied all the terms of the agreement for the settlement of the claims advanced by the parties. None of the terms of the agreement were modified by any of the provisions of the decree. The court could not have entered decrees which did not give full effect to its approved agreement of the parties, had it been disposed to do so.

Speaking of the character and effect of such agreements and decrees, the court in the case of *American Radium Co.* v. *Hipp. Didisheim Co., Inc.,* 279 Fed. 601-603, said:

> "They are to be read within their four corners, and especially so, because they represent the agreement of the parties, and not the independent examination of the subject-matter by the court. Neither court, nor party, can write in them what is not there, and thus change what was agreed upon between the parties."

Here the parties had agreed upon all the matters which were to constitute a full settlement of the subject-matter of the litigation. This agreement had been submitted to and approved by the court. No fact relating to the subject-matter was thereafter open to investigation. Nor could the court have opened the way to such investigation, so long as its approval of the compromise agreement was in effect. This, of itself, placed the subject-matter of the litigation beyond the reach of investigation by either the parties or the court. Any investigation thereafter attempted could not have been directed to anything concerning the subject-matter of the suit. All questions as to the propriety or ad-

visability of entering a decree consistent with the compromise agreement were eliminated by the acts of the parties. In approving the compromise agreement the court annexed the condition that it be approved by the Attorney General and by the Secretary of the Interior. It was proper for the court to make such investigation as satisfied him the condition had been met before entering its decree, but this did not involve the investigation of any fact connected with the subject-matter of the litigation. All this had been settled by the compromise agreement. The compromise agreement was not, therefore, merely the initiation of the decrees based thereon. It was the sole basis of the decree.

After the parties have agreed to the terms of settlement of an action before a court, the only function of the court is to carry the agreement into effect by a decree in accord with the agreement. The settlement is the act of the parties, and not the court.

—*Ellis* v. *Ellis*, 193 N. C. 216, 136 S. E. 350;
Carpenter, et ux., v. *Carpenter*, 213 N. C. 36, 195 S. E. 5, 7.

The compromise agreement of itself is an express consent of all the parties to the entry of a decree, without a judicial investigation or determination of any questions of fact raised by the pleadings.

> "Consent excuses error, and ends all contention of the patries. It leaves nothing for the court to do but to enter what the parties have agreed upon, and when so entered, the parties themselves are concluded."
>
> —*Schmidt* v. *Oregon Gold Min. Co.*, 28 Ore. 9, 40 Pac. 1014.

And where a judgment is rendered upon an agreement of the parties, the judgment puts an end to the agreement,

and the party in whose favor the judgment runs is estopped from saying it does not carry out the terms of the agreement.

—*State Bank* v. *Young,* 2 Ind. 171, 52 Am. Dec. 501.

An agreement which fixes the terms of the decree to be entered, fixes the character of such decree. Where parties competent to contract agree to the entry of a decree, settling any claims which are the subject-matter of litigation, a decree based on such agreement is a "consent decree" and not a judicial determination of the rights of the parties. Such decree is merely the record of the agreement of the parties.

—*Heyman* v. *O'Connell,* 13 N. E. 210, 293 Ill. App. 634.

The mere fact that the record of a purported agreement is evidenced by the entry of a decree conforming thereto does not validate an agreement, as against a party to it who was *incompetent* to enter into it. If Jackson Barnett was incompetent at the time those purporting to represent him attempted to bind him by an agreement they were without authority to make, the mere fact such agreement is evidenced by a consent decree, cannot operate to give it validity.

The substance of the compromise agreement is to the effect that, regardless of any question as to the validity of the oil and gas lease, and without any judicial inquiry into or determination of its validity there should be a present ratification and confirmation of it, and a decree should be entered to that effect. Such a decree had no greater effect than the terms of the agreement of the parties. Unless the agreement was binding upon Jackson Barnett the decree could not be. The court had no power to do for the parties what they could not do for themselves. By its decrees it merely sanctioned and judicially recorded what they attempted to do.

The conclusion of respondents that the decrees were not entered until

> " * * * the District Court had made all necessary independent judicial inquiry and determination to render and constitute said judgments and decrees *res adjudicata* of both issues of law and fact involved in the case or cases, in which the same were made and entered,"

is *erroneous,* as a matter of law. When the compromise agreement was submitted to it, the court had either to approve and accept it as the *sole* basis of the decree to be entered, or to decline to accept. Unless it rejected the agreement, it could not put the parties to proof of any of the issues raised. When approved nothing remained for judicial investigation.

The testimony, so-called, of Mr. Goldesberry and Mr. Diggs, referred to by respondents at pages 11 and 12 of their brief (set out in the appendix here), could not have been directed to any fact or facts related to the subject-matter of the litigation, for investigation into this, had been foreclosed by the approved compromise agreement. The agreement was intended to, and, if valid, did settle every issue presented, but without any judicial inquiry into or determination of any fact or facts upon which the correctness or binding effect of the decrees depended, as a matter of law. It is specious to argue that the informal action of the court, evidenced by the statements of Judge Diggs and Mr. Goldesberry, amounted to an "independent examination" of the subject-matter.

This proceeds upon an erroneous assumption. Nowhere in the agreement is there any reference to the pivotal fact upon which the validity of the lease depended—namely, the *competency, or capacity of Jackson Barnett to execute it.*

The issue presented was, the invalidity of an oil and gas lease of an incompetent, restricted Creek Indian, and this depended upon whether Jackson Barnett had capacity to make it.

The question, whether an attempted ratification of it might be in the interest of Jackson Barnett, was no part of the subject-matter which the court was required to adjudicate; though it might have been a matter proper to be considered in approving or rejecting the compromise agreement. Nor would such conclusion, reached without inquiry as to the controlling facts, and supported only by an agreement upon other facts, sustain a decree based thereon; and the observations of the court below, that

> "It follows, therefore, that when the Court made its examination of the issues, it had before it all the facts and questions of law set out in the agreement,"

if advanced as a reason why the decree was not a "consent decree," is patently *erroneous*. Had the agreement embodied, as the Court says it did, the facts and conclusions of law, the Court had only to look to the agreement. When it approved this, it accepted it as the basis for its decree. But as a statement of the *material facts* upon which a decision of the issues raised by the pleadings must be based it was fatally defective. It could not be determined therefrom whether the lease was *valid or void*, but instead the court, by consent of the parties to the agreement, assumed to ratify and confirm it, regardless of its validity, merely because it might be to the best interest of Barnett. If the court concluded seuh agreement, without more, was sufficient to support a decree purporting to ratify and confirm even a void lease, the error was *more than one of judgment*. It extended to the attempted exercise of a jurisdiction it *did not have*, for it was

in violation of the express statute prescribing the only method for alienation of restricted land. (See foot-note 1 page 4 of petition.)

Part of the quoted portion of the trial court's opinion (respondents' brief, p. 14) confirms the conclusion the informal inquiry of the Court related to the advisability of a settlement of Barnett's claims by a consent decree, and *without a trial.* The statement made—that on the submission of the compromise agreement to Judge KENNAMER, it was stated:

> "* * * that the compromise would be to the best interest of Jackson Barnett,"

and that the Court then,

> "* * * after hearing evidence therein as to whether the compromise agreement was to the best interest of Barnett,"

clearly defines the limits of the only inquiry undertaken by the Court. The matter inquired about was not an issue, and, as far as the power of the Court extended, it was wholly immaterial whether a settlement by an unauthorized compromise was, or was not, for the best interests of Barnett. How any court could ever reach a conclusion that it was "to the best interest of the incompetent" to strip him of most all of his wealth, and transfer to others, is beyond a rational mind.

It was the definite and only purpose of the agreement, to *eliminate* all questions touching the execution of the lease, the mental competency of Barnett, and the capacity of a spurious guardian to act in his behalf, as well as the settled principle of law, that only a guardian, legally qualified, could execute a valid lease. The plan was designed to prevent inquiry into any of these issues, by an agree-

ment of parties without lawful authority to bind the incompetent. The attempt to effectuate that end was *beyond the jurisdiction of the Court.* The United States was cognizant of the weakness of the effort to, by judicial fiat, give validity to a void lease, by merely consenting to a confirmation of it. Its view is expressed in the letter of Mr. Stivers (R. 746, 747) who, among other things, advised the Attorney General that:

> "Since the failure of consideration is not an issue in this case, I am unable to understand how the payment of $35,000.00 can make a void lease valid."

The whole controversy here depends upon whether or not the decree in Consolidated Cause No. 216-Equity is, or is not, a *consent* decree. If this Court finds that it is, this should be the end of the matter, so far as petitioner's right to the writ goes. If it is a consent decree, then the Court below erred in finding it was *res adjudicata*, and its decision is in direct conflict with the established rule, repeatedly announced by both the state and lower federal courts, and by this Court. Respondents have sought to confuse the issue by the suggestion the Court in Consolidated Cause No. 216-Equity must have entered upon a needless investigation to determine facts and issues, the parties themselves were studiously attempting to avoid. If the Court had the power it assumed, to, by a consent decree, give effect to the attempted ratification and confirmation of an oil and gas lease, regardless of its validity, and the sole object of the compromise settlement was to induce it to do so, then no judicial determination of the issues upon which the concolidated suits were brought was necessary. And none was had. On this we say the record is conclusive. (See authorities, foot-notes 11 to 16, pages 22 to 36 of petition.)

We have no fault to find with the argument, as an abstract proposition made by respondents (pp. 24-25) supporting the rule laid down in *Pope* v. *United States*, No. 26, decided November 6, 1944—that the entry of a "consent decree" is a judicial act. But, as a prerequisite to a valid "judicial act" of that character, it must be preceded by and grounded upon a *binding consent* of the parties. The case does not hold that a decree entered without such consent is a valid "judicial act." That is the real question involved here.

Respondents studiously seek to evade the issue. They base their argument on the bald assumption, a valid and binding compromise agreement constituting the sole basis for the "consent decree" had been entered into. Their uncertainty as to which of the divers named so-called "representatives of this incompetent, restricted Indian," had authority to act in his behalf, in entering into the attempted compromise, is evidenced by the fact they do not elect as between the next friend, guardian *ad litem*, or the "two probate guardians." Cases already noticed in petitioner's application for the writ eliminate the guardian *ad litem* and next friend, and the fact that "two probate guardians" were enlisted, when, in any event, only one could have acted, is convincing that neither was qualified. (See petition, pp. 30-31-32.) Under the settled law controlling in cases of this character, not even a *qualified* guardian can alienate his ward's estate, without the express approval of the court having jurisdiction of it. Neither of the courts by which the "two probate" guardians referred to were appointed, had jurisdiction of the estate of Jackson Barnett. The purported appointments of such guardians were *spurious*, and the

record is convincing, their appointments were procured in aid of the effort to foist a simulated "compromise agreement" upon the court from which the "consent decrees" were sought.

In advancing the Attroney General and Secretary of the Interior, as official agencies clothed with authority to act for an incompetent, restricted Indian, in negotiating a valid compromise agreement, divesting him of his estate, they drive, in the face of the concession of Judge HUXMAN in the opinion of the lower court, quoted at page 9 of their brief, that it was error on the part of the trial court to find and hold that the approval of either or both of them gave validity to the unauthorized compromise agreement. The statement that jurisdiction of the parties and the subject-matter "includes power to determine with binding effect every justiciable issue involved," carries with it the duty of the court to exercise such jurisdiction "to determine" the issues according to law.

The attempted substitution of an invalid compromise for the judicial investigation essential to a determination thereof, and the entry of a "consent decree," based on such compromise, is not merely an error in the way such issues are determined, but is the attempted exercise of a jurisdiction *beyond the power of the court to exercise*. And only a correct statement of the proposition is required to bring us back to the real question presented by the petition for the writ. In their argument (p. 10 of brief) respondents would reverse the process by which the court was induced to enter its "consent decree." Instead of such consent being "super-added" to an adjudication already made by the court upon and after proper judicial inquiry, the consent relied upon, evidenced by the compromise agreement

here, not only *preceded* any attempt by the court to investigate and adjudicate the matters before it, but such compromise was adopted as an all embracing *substitute* for such judicial action. The existence of this fact destroys the basis for the argument advanced by respondents.

The rule followed in the cases of *Mars, et al.*, v. *McDougal, et al.*, 40 F. (2d) 247; *Conner, et al.*, v. *Cornell, et al.*, 32 F. (2d) 581, and the others cited at pages 27 to 29 of respondents' brief, *has no application here.* In each of those cases where control of the litigation was exercised by the United States, the litigation was either instituted by it in its own right, or its intervention therein was *on behalf* of its Indian ward. It was in good faith attempting to perform duties incident to its assumed guardianship of its ward. In the litigation in which the consent decrees were entered, while it ostensibly assumed the position of guardian, it proceeded as an adversary, resisting the claims of its ward. For all purposes, it was as actively a defendant as any of the parties against whom Jackson Barnett was asserting an adverse right, and with less justification. Unless the United States was ready to assume the obligations incident to the guardianship, it had no business in the litigation. It owed no duty to the adversary defendants of Barnett. In its answer in that litigation (R. . .) it set up matters which, if established, would have required a decree supporting the claims of Barnett. But instead of demanding such relief, it attempted to rest upon other grounds advanced, to defeat his claims, and prayed for the same relief as that asked by the other adversaries of Barnett.

To argue that the United States, under feigned claim of guardianship, may enter litigation which its incompetent Indian ward has an unqualified legal right to maintain,

on his own account, and therein seek to *defeat* his claimed right, and then take advantage of the position it has wrongfully assumed, and dismiss with prejudice a suit brought in the first instance by its ward, is as unwarranted as it is vicious and unconscionable. To sustain such a theory, would operate to effectively deprive an incompetent, restricted Indian of his constitutional right to protect his individual personal or property rights in court. It may be conceded that a dismissal with prejudice by a party having authority to act, renders the judgment *res adjudicata*, but this is far from conceding that one appearing in the litigation as an adversary of another for the expressed purpose of defeating an independent suit initiated by him, may dismiss the other's suit with prejudice. To urge such doctrine seriously is as unthinkable as it is unconscionable. A guardian if, for reasons which satisfied it, is unwilling to asssit its ward in litigation, should at least decline to interfere with the prosecution of it by its ward. Not to do so, is a flagrant violation of fair play and the rights of its ward, and the statutory duty of such guradian. We are unwilling to believe this or any other court will approve and sanction the effort of a guardian, and particularly a self-constituted one like the United States, in its relation to a helpless incompetent Indian ward, to enter litigation properly instituted by, or on behalf of, its ward, for the sole purpose of defeating it, to promote the interests of his adversaries.

In no other case involving Indians of the Five Tribes, or any other Indians, has the Government taken such position. The position, as well as the unwarranted acts of the United States, in attempting to defeat the claims of Barnett, advanced in Consolidated Cause No. 216-Equity, clearly distinguished this case from all of the cases cited by respondents, in support of the binding effect of the effort of

the United States to dismiss with prejudice, the suits brought on behalf of Jackson Barnett.

The statement of counsel (respondents' brief, p. 27) that

> "Consequently, the District Court, had it seen fit to do so, could have made and entered the judgments and decrees under attack, merely and solely upon the approval and execution of the compromise agreement herein, by the United States, acting through its Secretary of the Interior and its Attorney General and without any judicial ascertainment or determination whatsoever,"

squarely presents the issue, and the only issue before the court on petitioner's application for *certiorari*. The interpolation of the words, "had it seen fit to do so" was needless, for the record here is conclusive the court did see fit to enter the consent decrees, solely upon the approvals of the Attorney General and the Secretary of the Interior of the compromise agreement, for, after approving that agreement, it did nothing more than withhold entry of its decrees until this approval by said officials was secured. These decrees had been prepared and were submitted to the court at the same time it approved the compromise agreement. Apparently uncertain of its jurisdiction to then enter its decrees, or of the propriety of doing so, it asked for approval of its proposed action by the Attorney General and the Secretary of the Interior. To say that their approval extended the court's jurisdiction to enter its consent decrees, grounded upon the compromise agreement, is opposed to the settled rule followed consistently by this Court, the inferior federal courts and the Supreme Court of Oklahoma, and with which, petitioner claims, the decision of the Circuit Court of Appeals here is in direct conflict.

Maxwell Land Grant Case.

Commencing on page 21 of respondents' brief, they present as authority for the exercise by the District Court, in Consolidated Cause No. 216-Equity, of jurisdiction to enter the consent judgment in that cause, the case of *Thompson, Adm'r,* v. *Maxwell Land Grant & Ry. Co.*, 168 U. S. 451, 42 L. ed. 539, and quote at some length from said decision.

We submit, at the outset, in answer to such contention, that said decision does not in any wise determine the question here presented and is not authority for the decision rendered in this case, dealing with the property of a full-blood, restricted and mentally incompetent member of the Creek Nation of Indians, and in effect, divesting said Indian of the title and ownership of property of great value, contrary to the plain provisions of the laws of Congress, fixing and determining the manner and method by and through which such properties may be so divested and transferred to others.

The facts involved are set forth clearly and fully in the opinion of Mr. Justice Brewer, of this Court. The recitals in the opinion, in substance, are as follows:

The litigation involved in that matter was, in the final decision of the Supreme Court, upon the question of the rights of three minor children of one Alfred Bent, who was, in previous litigation and during his life, adjudged to be the owner, under a parol agreement, of an undivided one-fourth interest in the lands involved, as an heir of the original patentee, and that Maxwell purchased all of the outstanding interest of the heirs of the patentee in the Spanish Grant.

Negotiations to purchase the interests of Charles Bent, at the time the other heirs conveyed, were not fully consummated, but had reached the point where Maxwell had offered $18,000.00, and Bent had asked $21,000.00, and that a deed was prepared for the signature of Bent and the other heirs, upon that basis. Bent delayed for a few days the execution of the deed to him, on the belief that Maxwell would pay more than the $18,000.00. The decision reflects that Bent intended to finally consummate the deal on those figures, if necessary; but, before the deed was finally delivered, Bent died suddenly; that before his death, Bent had executed, in due form, a will, under the terms of which he transferred to his widow all of his property, both real and personal, including these lands; that a clause provided that the widow should use the property and proceeds for the joint use of herself and the three children.

Mr. Justice BREWER, in his opinion, states that the title to *all* of said property had passed to the widow, under the terms of the will, and that she had full power and authority to convey the property to others, which was binding upon the minors; and that, subsequent to the death of Bent, the widow consummated the contract with Maxwell, and conveyed by deed to Maxwell, as the widow of Charles Bent.

The opinion further states that all of the facts, oral and written, constituting the history of and rights of Charles Bent, in the lands, *were heard upon a trial;* and that, upon the death of Bent, the widow was appointed as guardian *ad litem* to represent the interests of the minors, and herself made a party to the suit. She was also named in said cause as Commissioner in Chancery, with full powers and authority, under the orders of the Court, to convey the interests formerly owned by Charles Bent in all the lands

claimed by Maxwell, under the terms of the purchase, and the deed thereon, executed by the widow, as above stated, and that the consideration was fair. The opinion also cites that the testimony indicates that the Charles Bent interests brought to the widow and children more than the other adlut competent heirs received for their interests, and that the husbands of the other heirs were intelligent business men and capable of protecting the interests of their wives in such transaction.

The opinion recites also that the minor children had no right or title to said property, and that, under said will, the widow was authorized to exercise her own discretion in all matters pertaining to the intersets of the children, under the terms of the will.

How could such a decision be applicable in this case, as an authority for these so-called representatives of Barnett to enter a consent decree, the effect of which was to take away from Barnett, an incompetent, that which, under the pleadings, constituted almost his entire property, and give nothing in return, and transfer it over to parties who had fraudulently and unlawfully gained possession of the property, in violation of the laws of Congress, and had no title or right therein, upon the undisputed facts?

The citation by respondents of decisions of the State of Massachusetts touching the authority and jurisdiction of the courts of that state, under local law, to deal with the rights of infants and their property, certainly have no force or effect in supporting the entering of the consent decrees involved here, and it is needless for petitioner to take further time or space to discuss those decisions.

The contention made (respondents' brief, pp. 19-21) that a court may in any case where an incompetent person's

property is involved, enter a decree which to the court appears *to the best interest* of the incompetent owner, when parties legally empowered to represent him have consented to such decree, presents a state of facts not present here. The settled law controlling in this and every other case where the restricted property of an incompetent Indian ward of the Government is involved, is that it is a legal impossibility for any person or agency, administrative or judicial, to enter into or by approval of any compromise agreement, made in settlement of pending litigation, divest such owner of his property or any interest therein. Where such owner is an incompetent, only his duly appointed guradian can initiate or complete any transaction which operates as a conveyance or incumbrance of his ward's estate, and then only with the approval of the County Court having jurisdiction of the estate. No other court, state or federal, is clothed with such authority. This proposition is covered in the original petition and brief of petitioner supporting application for the writ. (pp. 17-19, 30-31)

The argument that

> "All that is required is that the court, for itself, determine whether a judgment agreed to is, reasonable and proper and for the best interest of the minor or mentally incompetent person"

proceeds upon the assumption the decrees here were "agreed to," an assumption without foundation where it appears that there was no qualified guardian having authority to enter into such agreement, and where under all the decisions yet written, the authority of any other person or court to enter consent for the incompetent, has been flatly denied. This proposition is the pivotal and controlling one in the matter now before the court.

Respondents advance the proposition (brief, pp. 15-16) that as the trial court and the Circuit Court of Appeals have concurred in finding and holding that the judgments or decrees under attack were not "consent decrees," and were, therefore *res adjudicata,* thus:

> "This dual finding and holding sweeps out from under petitioner the whole and entire *factual* foundation (italics added) upon which, in its final analyses, is predicated his petition for *certiorari.*"

In all the cases cited by respondents, the court was dealing with questions of "fact," and they err in assuming that the concurrent findings in Consolidated Cause 216-Equity, were upon questions of fact. The concurrence here was purely and solely upon a conclusion of law—that the decrees in that case were *res adjudicata,* and the rule which respondents here attempt to invoke has no application.

We again remind the court that there was no fact whatsoever presented to the court, upon any issue involved in the litigation in Consolidated Cause No. 216-Equity, but that the decree entered therein was solely and purely upon the compromise esttlement agreement.

The repeated assertion in respondents' brief that there were justiciable facts presented to, or considered by, the trial court, as an element of his decision or decree therein, is completely refuted by the record, and we now, in addition to what has been said with reference to the recitals of the compromise agreement and the decree, and for the convenient reference of the court, refer to a brief statement of the testimony of John M. Goldesberry, district attorney, James B. Diggs and R. H. Wills, attorneys for respondents, attached hereto as an *Appendix,* and ask the Court to care-

fully read the same, if there is any question in their minds about what was done and said on the occasion of the approval of the compromise agreement and the entry of the decree.

Conclusion.

We feel we have, as briefly as possible, called attention to the unjustified claims of respondents, and have strengthened, if that were possible, the clear and undoubted sufficiency of the plaintiff's petition, and the brief therein attached, to justify this Court in immediately granting a writ, as therein prayed.

Respectfully submitted,

CHAS. B. ROGERS,
Attorney for Petitioner.

Of Counsel:
JOSEPHUS C. TRIMBLE,
HARRY S. HALL.